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In the Supreme Court of the United States

OCTOBER TERM, 1980

W.C. MCDANIEL, ET AL., PETITIONERS

v.

JOSE SANCHEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, absent compliance with the preclearance requirements of Section 5 of the Voting Rights Act of 1965, a federal district court may adopt and order into effect a reapportionment plan submitted to it on behalf of the local legislative body of a jurisdiction covered by the Act.

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INTEREST OF THE UNITED STATES

This case raises an important question concerning the scope of the Attorney General's enforcement responsibilities under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). Under Section 5, the Attorney General must review changes in election laws submitted by covered jurisdictions to determine whether such changes have either the purpose or the effect of denying or abridging the right to vote on account of race or color. The Attorney General also has authority under the Act to initiate suits to prevent implementation of changes in election laws prior to compliance with the preclearance procedures of Section 5. The Court's resolution of the question presented here will directly affect these responsibilities. The United States has previously participated either as a party or as amicus curiae in virtually all Supreme Court cases involving the Voting Rights Act, including two previous cases dealing with the issues presented here, *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976), and *Wise* v. *Lipscomb*, 437 U.S. 535 (1978).

STATEMENT

Kleberg County is a rural county in Texas that had a population of 33,166 in 1970. Of that number, 44% were Mexican-American and 3% were Black (Pet. App. 3, 8). The Commissioners Court is the governing body of the county, and consists of one county judge and four county commissioners.[1] Each commissioner is elected from a separate commissioner precinct (Pet. App. 3-4).[2] An apportionment plan for the commissioner precincts, based on county voter registration lists, was implemented in 1968. The precincts were not reapportioned following the 1970 Census (Pet. App. 5). If the county had been

[1] The Commissioners Court members serve for four years, with two commissioners elected every two years.

[2] The county judge is elected from the county at large.

divided into equal precincts on the basis of the 1970 Census, each precinct would have had a population of 8,291. In fact, Precinct 1, the largest precinct, had a population of 9,928, or 19.73% more than the ideal, while Precinct 4, the smallest precinct, had a population of 6,702, or 19.17% less than the ideal. The maximum deviation from the largest precinct to the smallest precinct was therefore 38.9% (Pet. App. 5).[3]

On January 26, 1978, respondents filed this voting rights suit against the county judge, the county commissioners and other county officials, seeking injunctive and declaratory relief under 42 U.S.C. 1983 and 28 U.S.C. 2201-2202. The complaint alleged two separate claims under the Fourteenth Amendment: that the commissioner precincts were malapportioned in violation of the constitutional principle of one-person, one-vote; and that the apportionment plan unconstitutionally diluted the voting power of Mexican-Americans in Kleberg County by concentrating the Mexican-American population in Precinct 4 (Pet. App. 1).[4]

On February 3, 1978, a hearing was held on the respondents' motion for a preliminary injunction to enjoin the May 1978 primary elections for county commissioners (Pet. App. 2). The testimony at the hearing was limited to the malapportionment claim (Pet. App. 3). The peti-

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[3] The population according to the 1970 Census in each precinct under the 1968 reapportionment plan is as follows (Pet. App. 8):

Precinct	Total Population	Mexican-American		Anglo		Black	
		No.	%	No.	%	No.	%
1	9,928	4,002	40.3	5,926	59.7	0	0
2	9,269	2,865	30.9	6,404	69.1	0	0
3	7,267	1,337	18.4	4,932	68.0	998	13.6
4	6,702	6,413	95.7	288	4.3	0	0

[4] Prior to 1968, no Mexican-American had ever been elected to the Commissioners Court. Since the 1968 reapportionment, Mexican-Americans have been elected to the commissioner position in Precinct 4, but they have not held any other positions in the Commissioners Court (Pet. App. 17).

tioners defended the 1968 apportionment plan by challenging the accuracy of the figures introduced by the respondents to show malapportionment (*ibid.*). Ten days later, the district court denied the motion, finding that the statistical evidence was too "uncertain" to warrant interim relief (District Court Opinion of Feb. 13, 1978). On August 14, 1978, the Fifth Circuit vacated this decision and remanded for reconsideration in light of *Lister* v. *Commissioners Court*, 566 F.2d 490 (1978), which held that a Commissioners Court "had a clear duty to reapportion on the basis of the 1970 census." 566 F.2d at 492.

Following remand, on October 30 and 31, 1978, the district court held a two-day trial (Pet. App. 3). Most of the testimony concerned the claim of voting dilution (Pet. App. 5). Approximately one year later, on October 2, 1979, the district court issued an opinion concluding that the 1968 apportionment plan for county commissioners violated the constitutional principle of one-person, one-vote (Pet. App. 4-5). Noting that "[t]he initial burden of fashioning a constitutionally permissible remedy is on the County Commissioners Court," the court instructed the petitioners "to submit a proposed new plan by the 13th day of November, 1979," and scheduled a hearing for December 10, 1979 (Pet. App. 19). On the claim of voting dilution, the district court found that Mexican-Americans in Kleberg County have historically suffered from racial discrimination in voting and in other areas (Pet. App. 16-18). Analyzing the evidence in light of the standards articulated in *Zimmer* v. *McKeithen*, 485 F.2d 1279 (5th Cir. 1973), the court nevertheless concluded that the respondents failed to meet their burden of proving that the 1968 apportionment plan precluded effective participation by Mexican-Americans in the election process (Pet. App. 18).

Pursuant to the district court's instructions, the Commissioners Court submitted a proposed plan (Pet. App. 22). The population of the precincts under the proposal ranged from 8,305 in Precinct 1 to 8,336 in Precinct 4,

with a maximum deviation of less than one-half percent (J.A. 20-21).[5] The commissioners employed a statistician, Dr. Robert T. Nash, to assist them in preparing the new plan (J.A. 14, 24-25); they instructed him to redraw the commissioner precinct boundaries to achieve equality of population and to attempt "to keep the voting precincts together as much as possible and to break as few as he could" (J.A. 25, 34, 46). They also provided him with population data, which he used to draw up the plan (J.A. 14-15, 34). After at least three meetings with the commissioners, Dr. Nash completed the plan and presented it at a formal meeting of the Commissioners Court (J.A. 25-28). The commissioners reviewed the plan and asked Dr. Nash to redraw the boundary between Precincts 1 and 4 so that the county courthouse would be located in Precinct 1 rather than Precinct 4 (J.A. 28, 39, 46). The plan was then "officially adopted at the Commissioners' Court meeting to be presented to the court" (J.A. 40; App. 1a-3a, *infra*). When asked why the Commissioners Court did not consider either of two reapportionment plans proposed by respondents, County Judge McDaniel testified that the commissioners preferred to "redistrict ourselves", and did not want Dr. Nash to "be polluted by any other plans that might be presented" (J.A. 42).

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[5] The following chart shows the populations of each precinct under the 1968 reapportionment plan and the plan submitted by the Commissioners Court (J.A. 77-78):

Precinct		1968 Plan	1979 Plan
1	Anglo	59.7	72.0
	Mex.-Amer.	40.4	24.0
	Other	0	4.0
2	Anglo	69.1	60.0
	Mex.-Amer.	30.9	38.5
	Other	0	1.5
3	Anglo	68.0	76.0
	Mex.-Amer.	18.4	11.0
	Black	13.6	13.0
	Other	0	.2
4	Anglo	4.3	8.7
	Mex.-Amer.	95.7	91
	Other	0	.3

At the December 10 hearing, respondents raised three objections to the proposed plan. First, they challenged the use of population data from insurance records rather than from the 1970 Census as the basis for apportioning part of the county (J.A. 23-24, 71-72). Second, they argued that the plan was a legislative reapportionment plan that had to be precleared under Section 5 of the Voting Rights Act of 1965 before the district court could consider its constitutionality under the Fourteenth Amendment (J.A. 10-12, 72-73). In connection with this claim, respondents demonstrated that the proposed plan reduced the voting strength of Mexican-Americans in Precinct 1 from 40 to 24 percent (J.A. 51-54, 77-78) by moving part of Precinct 1 into Precinct 4 (J.A. 30, 43).[6] Finally, assuming arguendo that the proposed plan was not subject to preclearance, respondents argued that the plan impermissibly diluted the voting strength of Mexican-Americans in the county in violation of the remedial standards governing judicial reapportionment plans (J.A. 10-13; see also Memorandum in Support of Injunction Pending Appeal 7-9).

On January 14, 1980, the district court held that the proposed apportionment plan remedied the previous malapportionment and ordered it into effect for the upcoming elections for Precincts 1 and 3 (Pet. App. 22). Relying on *East Carroll Parish School Bd.* v. *Marshall*, *supra*, 424 U.S. at 638-639 n.6, it concluded that the plan was judicial rather than legislative and therefore was not subject to Section 5 of the Voting Rights Act of 1965 (Pet. App. 22-23). The court did not address respondents' claim that the new plan impermissibly diminished

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[6] As a practical matter, the reapportionment plan only affected Precincts 1 and 3, because the upcoming 1980 election only involved those precincts (J.A. 36), and the commissioners "figured that after the 1980 census comes out, we will have to redistrict again" (J.A. 47). For that reason, respondents argued that these precincts should be considered in isolation and that the apparent increase in the voting strength of Mexican-Americans in Precinct 2 could not be considered to offset the adverse effect of the change in Precinct 1 (see note 5, *supra*).

the voting strength of Mexican-Americans in Precinct 1 (see Pet. App. 21-23).

In a per curiam opinion issued on April 14, 1980, the court of appeals vacated the district court's order. Citing *Wise* v. *Lipscomb*, *supra*, the court held that the plan was legislative because it had been devised by the local legislative body to fulfill its "legislative responsibility" and did not lose that character "merely because it is the product of litigation conducted in a federal forum" (Pet. App. 28). It therefore held that the plan was subject to preclearance under Section 5 and remanded the case to the district court for appropriate relief (Pet. App. 26-29).

The district court directed the petitioners to commence preclearance procedures (Pet. App. 34-35). On August 14, 1980, Justice Powell stayed the Fifth Circuit's judgment (*McDaniel* v. *Sanchez*, No. 80-180), stating that *East Carroll Parish*, *supra*, and *Wise* v. *Lipscomb*, *supra*, appears to be inconsistent and "fall considerably short of providing clear guidance to the courts that initially address this difficult issue" (slip op. 4). This Court granted certiorari on October 14, 1980.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether the court of appeals properly required preclearance under Section 5 of the Voting Rights Act of 1965 of a reapportionment plan formulated by the Commissioners Court of Kleberg County, Texas,[7] prior to its submission to and approval by a

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[7] The plan clearly is within the scope of Section 5 (42 U.S.C. 1973c). It is undisputed that Kleberg County is a covered jurisdiction within the meaning of Section 4(a) of the Act, 42 U.S.C. 1973b(a), to which the provisions of Section 5 apply. See page 11, *infra*; 28 C.F.R. 55.24, App. It is also undisputed that a reapportionment plan qualifies as a "standard, practice, or procedure with respect to voting" covered by Section 5. *Georgia* v. *United States*, 411 U.S. 526, 529 (1973). Finally, it is clear that the 1979 reapportionment plan differs from the one in effect on November 1, 1972. See pages 1-5, *supra*.

federal district court.[8] The district court invalidated the preexisting apportionment scheme, which consisted of four single-member commissioner precincts, as violative of the Fourteenth Amendment principle of one-person, one-vote. Rather than devising its own remedial plan, the court deferred to the commissioners' judgment and directed them to "fashion[] a constitutionally permissible remedy" (Pet. App. 19). The Commissioners Court then exercised its independent legislative judgment in formulating a redistricting plan for the four commissioner precincts, which it submitted to the district court for approval. The court of appeals correctly held that this plan should have been precleared under Section 5 before being submitted to the district court.[9]

Section 5 was enacted to provide special protection to the voting rights of minorities in jurisdictions with long

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[8] Since the court of appeals ruled that the proposed plan should have been precleared prior to its submission to the district court, it did not address respondents' alternative claim that the plan was inadequate under the standards applicable to court-approved reapportionment plans (Pet. App. 26-29). If this Court reverses the Fifth Circuit's judgment, it would be appropriate for that court to address this claim on remand.

[9] The district court properly refused to grant respondent's motion to convene a three-judge court to consider the applicability of Section 5 to the commissioners' proposed plan (Pet. App. 24). Section 5 provides that "[a]ny action *under this section* shall be heard and determined by a court of three judges * * * and any appeal shall lie to the Supreme Court." 42 U.S.C. 1973c (emphasis added). Since the complaint in this case does not allege a claim under Section 5, the case is not within the language of the statute and therefore a three-judge court was not required. Cf. *Allen* v. *State Board of Elections*, 393 U.S. 544, 560-563 (1969). This Court has noted that statutes requiring three-judge courts should be narrowly construed because such courts place a burden on the federal court system, frequently delay issues requiring swift resolution and deprive this Court of intermediate appellate review. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 128 (1965).

Of course, the preclearance requirements of Section 5 apply to all changes in voting procedures by covered jurisdictions, not just those that are the subject of a Section 5 complaint. 42 U.S.C. 1973c; see pages 11-17, *infra*.

histories of voting discrimination. This Court has accordingly been reluctant to permit covered jurisdictions to circumvent the requirements of Section 5. Requiring preclearance of the plan proposed by the Commissioners Court here similarly avoids such circumvention and furthers the remedial purposes of the Act. It is, moreover, consistent with the Act's plain language and legislative history, and with this Court's decision in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978).

Section 5 requires preclearance of all voting changes proposed by covered jurisdictions—whether the jurisdiction "enacts" or otherwise "seeks to administer" the change. If that language were not sufficiently clear on its face, Congress expressly noted, when it reenacted Section 5 in 1975, that preclearance is required whenever the new plan is proposed by the governmental body in the course of litigation (S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975). Nothing in either the statutory language or the legislative history suggests that preclearance is required only when the legislature voluntarily changes voting procedures, or that legislatures operating under unconstitutional apportionment schemes can avoid preclearance simply by awaiting suit and then proposing a reapportionment plan to the district court.

Section 5 represents a congressional balance between the need for special protection of voting rights and the possible delay and inefficiency of the centralization of responsibility for preclearance review in the Attorney General and the District of Columbia District Court. Although the reapportionment court must stay its proceedings pending completion of the preclearance process, the statute provides for an expedited preclearance procedure, and if even that procedure is too lengthy in particular circumstances, the district court always has the option of implementing its own interim plan. On the other side of the balance, Congress concluded that centralization of responsibility for preclearance was necessary to assure that the protection of the voting rights of minorities is given the high priority (under uniform

standards) that Congress concluded was appropriate when covered jurisdictions are involved.

The Court's decision in *Wise* v. *Lipscomb*, *supra*, not only supports the court of appeals' interpretation of Section 5, but it also provides an independent basis for affirming the decision below. Thus, in *Wise*, both Justice White, announcing the Court's judgment, and Justice Powell, concurring, focused on the legislative origin of the plan at issue there in concluding that it should be treated as a legislative, rather than a judicial plan. They differed only in the importance that they attached to the governing body's authority, under local law, to redistrict itself. But whatever the importance of this factor, the Commissioners Court here had at least as much authority to reapportion itself as the city council in *Wise*.

Although *Wise* dealt with the question whether the plan at issue there was legislative or judicial for purposes of determining the applicable standard of judicial review, the same analysis of the difference between the two types of plans applies in cases such as this, where the issue is whether preclearance is necessary. Only by applying the same standard for both purposes can there be assurance that reapportionment plans implemented by jurisdictions covered by Section 5 will be subject to either the special remedial standards applicable to judicially devised plans or the special scrutiny prescribed by Section 5.

ARGUMENT

I.

CONGRESS INTENDED REAPPORTIONMENT PLANS FORMULATED BY COVERED JURISDICTIONS IN THE COURSE OF LITIGATION TO BE PRECLEARED UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

The Voting Rights Act of 1965 was designed to remedy the "insidious and pervasive evil" of discrimination in voting, "which had been perpetuated in certain parts of

our country through unremitting and ingenious defiance of the Constitution." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 309 (1966). Based on extensive hearings, Congress found that suits to enforce constitutional rights did not offer adequate protection because litigation had been too slow and, even when favorable decisions were finally obtained, affected jurisdictions "merely switched to discriminatory devices not covered by the federal decrees * * *" (*id.* at 314). Concluding that "sterner and more elaborate measures [were necessary]" (*id.* at 309), Congress adopted a "complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant" (*id.* at 315).

Section 4 of the Act determines the jurisdictions that are subject to the Act's special protections. See *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 118-121 (1978). The coverage formula under Section 4 is based on Congress's determination that jurisdictions meeting the stated criteria have previously engaged in pervasive discrimination in voting and are likely to continue to circumvent constitutional requirements (*id.* at 121).[10]

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[10] As originally enacted in 1965, Section 4 applied to any state or political subdivision for which (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting-age residents were registered for, or voted in, the presidential election of November 1964. The phrase "test or device" was defined to include the following requirements for registration or voting: literacy and educational achievement tests; good moral character requirements; and voucher systems. See 42 U.S.C. 1973b(c); *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 317-318. When the Act was amended and reenacted in 1970, the coverage formula of Section 4 was expanded to include November 1968 voting and registration results; the definition of "test or device" in Section 4(c) was retained. 84 Stat. 315.

In Texas, less than 50% of the voting-age population voted in the presidential elections in 1964 and 1968, but Texas was not covered by Section 4 because it did not use a "test or device" as defined in Section 4(c) of the 1965 and 1970 Acts. See H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 17 (1975); S. Rep. No. 94-295, 94th Cong., 1st Sess. 25 (1975).

Based on "overwhelming evidence" of "the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities," (H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 22, 26-27 (1975); S. Rep. No. 94-295, 94th Cong., 1st Sess. 35, 39 (1975)), Congress in 1975 expanded the coverage formula to include the use of English language registration or voting materials in any state or political subdivison in which the Director of the Census has determined that more than 5% of the voting-age citizens are members of a single language minority. 89 Stat. 400-402; 42 U.S.C. 1973b (f)(1). This change was principally designed to bring Texas within the preclearance requirements of Section 5 because of that state's long history of voting discrimination against blacks and Mexican-Americans. *Briscoe* v. *Bell*, 432 U.S. 404, 406 (1977); H.R. Rep. No. 94-196, *supra*, at 17-22; S. Rep. No. 94-295, *supra*, at 25-30.

One of the Act's primary means of affording special protection for Fourteenth Amendment rights is Section 5. Under Section 5, jurisdictions covered under Section 4 may not "enact or seek to administer" any "different" voting qualification or procedure without submitting the change for review either to a three-judge panel of the United States District Court for the District of Columbia or to the Attorney General (42 U.S.C. 1973c). In these proceedings, the covered jurisdiction bears the burden of demonstrating that the proposed change in voting procedures "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (*ibid.*) or because of membership in a "language minority group" (42 U.S.C. 1973b (f)(2), 1973*l*(c)(3)). In contrast to a suit to enforce constitutional voting rights directly, under the Act proof of a constitutional violation is unnecessary to bar the use of new voting procedures. The burden of proof is on the covered jurisdiction rather than on those challenging the procedures, and the jurisdiction must prove the absence of both discriminatory purpose and discrimina-

tory effect. Compare *City of Rome* v. *United States*, No. 78-1840 (Apr. 22, 1980) with *City of Mobile* v. *Bolden*, No. 77-1844 (Apr. 22, 1980). Cf. *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 157 (1977).[11]

Consistent with the protective and remedial purposes of Section 5, this Court has repeatedly interpreted that Section to give it "the broadest possible scope." *Allen* v. *State Board of Elections*, 393 U.S. 544, 566-567 (1969); *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978); *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32 (1978); *Georgia* v. *United States*, 411 U.S. 526 (1973); *Perkins* v. *Matthews*, 400 U.S. 379 (1971). Section 5 should again be broadly construed in this case to require preclearance of a reapportionment plan formulated by a covered jurisdiction and submitted to the district court during the course of reapportionment litigation. This interpretation is supported by the language of Section 5, its legislative history, and its underlying policies.

A. The Language and Legislative History of Section 5 Require Preclearance of Plans Formulated by Covered Jurisdictions in the Course of Litigation

By its terms, Section 5 applies whenever a covered jurisdiction "enact[s] or seek[s] to administer" a change in voting procedures. Significantly, there are no statutory exceptions to the rule requiring preclearance of all voting changes by covered jurisdictions.

This Court has interpreted this language to permit only one narrow exception to the requirement of preclearance. *Connor* v. *Johnson*, 402 U.S. 690 (1971). This exception, which was endorsed by Congress when it extended the Voting Rights Act of 1965, applies only "where the court, because of exigent circumstances, actually fashions the plan itself * * *." S. Rep. No. 94-295, *supra*, at 19. This is consistent both with the lan-

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[11] This Court reaffirmed the constitutionality of these provisions last Term in *City of Rome* v. *United States*, *supra*.

guage of Section 5, which requires preclearance where the legislative body, not the court, "enact[s] or seek[s] to administer" a new reapportionment plan, and with the policy considerations that are served by avoiding the review of district court orders by an executive agency or by another district court.

Connor v. *Johnson* did not mean, however, that covered jurisdictions could evade the preclearance requirement of Section 5 whenever their voting procedures were challenged in an ongoing reapportionment suit. This was made clear by the Court's decision in *Connor* v. *Waller*, 421 U.S. 656 (1975), a later phase of the same litigation. The Court there held that reapportionment plans enacted by the Mississippi legislature in 1975, while a challenge to that State's earlier 1973 reapportionment plan was pending in the district court, were not and would not be "effective as laws until and unless cleared pursuant to Section 5," 421 U.S. at 656, and that the district court therefore erred in reaching the constitutional claims of racial discrimination under the new plans. (*Ibid.*).

Thus, a district court having jurisdiction of reapportionment litigation involving a covered jurisdiction may not decide whether a new reapportionment plan adopted by the jurisdiction "den[ies] or abridg[es] the right to vote on account of race or color" until the plan has been cleared under Section 5. Instead, when a new reapportionment plan is under consideration in the course of such litigation, the only question for the district court under the statute is whether the plan was formulated by the legislature or whether instead it was devised by the court. Even if a plan proposed by the legislature has not been formally enacted, submission of the plan to a district court for proposed adoption is a means by which the jurisdiction "seek[s] to administer" that plan. Under the language of Section 5, it makes no difference whether the jurisdiction has formally enacted its plan, as it did in *Connor* v. *Waller*, *supra*; whether it has formally authorized its counsel to submit it to the reapportionment

court subject to subsequent enactment if approved, as in *Wise* v. *Lipscomb*, *supra*, and in this case; or whether it proposes through counsel that it be effectuated without enactment by incorporation into the court's decree. In each case the jurisdiction "seek[s] to administer" the new reapportionment plan, so unless it has received clearance under Section 5, the new plan will not be considered "effective as law," and the district court should not address its constitutionality. See *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 542; *Connor* v. *Finch*, 431 U.S. 407, 412 (1979); *Connor* v. *Waller*, *supra*.

Any doubt that this was Congress's express understanding and intent was removed when it reenacted Section 5 in 1975.[12] The Senate Report states that Section 5 is intended to establish

> a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court.

S. Rep. No. 94-295, *supra*, at 18-19. And, specifically addressing the question at issue here, the Senate Report continues (*ibid.*):

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily

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[12] Because the language of Section 5 applies to any legislative plan that the jurisdiction "enact[s] or seek[s] to administer," it was not necessary for Congress to change the statutory language in 1975 in order to make Section 5 applicable to a reapportionment plan such as the one at issue here. This Court has stated that "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight" in statutory construction. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). Such consideration is especially appropriate where, as here, the congressional intent is expressed in legislation extending, without change, the earlier statutory provision, which otherwise would have expired.

> would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised.

This language, while somewhat ambiguous concerning a possible further extent of the preclearance requirement, makes it entirely clear that preclearance is required for any plan proposed by a governmental body in the course of litigation.

B. The Legislative Purpose In Enacting Section 5 will be Furthered by Requiring Preclearance of Plans in These Circumstances

The policies underlying the Voting Rights Act support the conclusion that preclearance is required whenever a covered jurisdiction "enact[s] or seek[s] to administer" a reapportionment plan reflecting its legislative judgment rather than the judgment of the court.[13] In enacting Sec-

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[13] There is no basis for petitioners' suggestion (Pet. Br. 18-19) that the plan formulated by the Commissioners Court in this case reflected the judgment of the district court rather than the legislative body. Although the commissioners employed a third party to assist them in redrawing the commissioner precincts, the commissioners gave Dr. Nash instructions in the preparation of the plan, provided him with population data, met with him on at least three occasions to discuss the plan, and, prior to approving the plan, requested him to redraw the boundary between Precints 1 and 4 so that the county courthouse would be located in Precinct 1 rather than 4. When asked why the Commissioners Court did not consider either of the two reapportionment plans proposed by respondents, County Judge McDaniel testified that the Commissioners Court would rather "redistrict ourselves" and did not want the draft of their plan to "be polluted by any other plans that might be pre-

tion 5, Congress was not concerned with providing special scrutiny of reapportionment plans devised by federal courts. Instead, it was attempting to prevent covered jurisdictions from "enact[ing] or seek[ing] to administer" any new voting procedure, whatever form that legislative effort might take, until the jurisdiction has demonstrated that its proposed change has neither a discriminatory purpose nor a discriminatory effect.

Although petitioners argue that Section 5 is directed only toward voluntary changes in voting procedures, and not those proposed in response to a court order, neither the language nor the policies of Section 5 support this position. Certainly it would be anomalous to impose the special requirements of Section 5 on those jurisdictions which, on their own initiative, adopt reapportionment plans in an effort to meet constitutional standards, while exempting those which reapportion only in response to constitutional challenges.

If this Court affirms the decision below, legislatures engaged in litigation will be encouraged to develop new plans that comply with Section 5. But if preclearance were not required, legislatures operating under unconstitutional apportionment schemes would have a disincentive to redistricting themselves, since they could avoid complying with Section 5 simply by awaiting suit and proposing a new reapportionment plan to the district court. Then the special protection that Congress intended to apply to all changes in voting procedures which covered jurisdictions formulate and "enact" or otherwise "seek to administer" would be lost. This Court has previously blocked attempts by covered jurisdictions, "which in the past had been so ingenious in their defiance of the spirit of federal law," to circumvent the special remedial provisions

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sented" (J.A. 42). On these facts, it is clear that the commissioners exercised a legislative judgment in approving the proposed plan, even though the commissioners did not personally prepare the details of the plan but instead took the common step of delegating this responsibility to an agent.

of Section 5. *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 121 (1978).

C. Petitioners' Objections to Preclearance are not Persuasive

1. *Preclearance Will Not Interfere With The District Court's Equitable Powers To Remedy Constitutional Violations*

The authority of the federal courts to remedy deprivations of voting rights protected by the Fourteenth and Fifteenth Amendments is well established. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). In the area of state and local reapportionment, federal court intervention is necessary because other avenues of relief are not available for the effective redress of constitutional rights. *Reynolds* v. *Sims*, *supra*, 377 U.S. at 570. With respect to claims of voting discrimination based on race or language, the administrative and judicial procedures of Section 5 of the Voting Rights Act of 1965 provide a special means of protection. Section 5 was designed in part to prevent abridgement of voting rights by means of reapportionment. *Georgia* v. *United States*, 411 U.S. 526 (1973).[14]

These avenues of relief are complementary, not mutually exclusive. When an existing apportionment plan is challenged and invalidated in the course of litigation under the Fourteenth or Fifteenth Amendments, the district court, wherever possible, must give the legislative body an opportunity to formulate a new plan that meets constitutional standards. See, *e.g.*, *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 539-542; *Connor* v. *Finch*, *supra*, 431 U.S. at 414-415. After the legislature exercises its legislative judgment and proposes a new plan, that proposal

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[14] The Attorney General and the District Court for the District of Columbia have no authority, however, to examine possible violations of the principle of one-person, one-vote independent of their statutory power to examine claims of discrimination based on race, color or language.

must be submitted to the Attorney General or the United States District Court for the District of Columbia for clearance under Section 5.

If Section 5 preclearance is obtained from the Attorney General, the reapportionment court, in considering the constitutionality of the plan, may consider the Attorney General's lack of objection along with other factors bearing on the constitutionality of the plan. See *Morris* v. *Gressette*, 432 U.S. 491, 505 (1977). On the other hand, if the Attorney General objects, the covered jurisdiction retains the option of seeking a favorable declaratory judgment from the District Court for the District of Columbia. *Id.* at 505 n.21. If the plan fails to receive clearance from the Attorney General or the District Court for the District of Columbia, the jurisdiction must devise a new reapportionment plan that meets Section 5 standards. Only after preclearance is received may the reapportionment court address constitutional challenges to the plan based on racial or language discrimination. *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 542; *Connor* v. *Waller*, *supra*.

This procedure not only reconciles the primary jurisdiction created by Section 5 with the responsibilities of reapportionment courts, but is consistent with the limited role federal courts should play in reapportionment (*Wise* v. *Lipscomb*, *supra*, 437 U.S. at 539-540) and advances the important purposes underlying Section 5 (*South Carolina* v. *Katzenbach*, *supra*). In addition, it in no way detracts from the concern implicit in *Connor* v. *Johnson*, *supra*, that a district court order announcing a reapportionment plan not be subjected to review by an executive agency or by another district court. By requiring Section 5 preclearance of a legislature's proposed plan *prior* to submission to or approval by the court, any interference with the legitimate prerogatives of the district court is avoided.[15]

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[15] Since the jurisdiction's plan is precleared prior to submission to the reapportionment court, this procedure also avoids the practical problem of distinguishing between a legislative and a judicial reapportionment plan where the court makes minor changes in the

Contrary to petitioners' suggestion (Pet. Br. 26-28), this approach does not impermissibly interfere with the district court's equitable powers to remedy violations of the one-person, one-vote standard or other constitutional violations.[16] Nor does it leave voters in jurisdictions operating under unconstitutional apportionment schemes without a remedy pending preclearance. As the court specified in *Connor* v. *Waller*, *supra*, 421 U.S. at 656-657, and as it reiterated in *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 542, the reapportionment court retains the authority in appropriate circumstances to devise and implement its own interim plan to govern upcoming elections. See also S. Rep. No. 94-295, *supra*, at 19. And after the legislature's plan has been precleared, the reapportionment court has the ultimate authority to determine whether the covered jurisdiction's proposed plan meets the applicable constitutional standards. See, *e.g.*, *Connor* v. *Finch*, *supra*, 431 U.S. at 414-420. Pending preclearance, however, the local district court is to stay consideration of all constitutional issues concerning the covered jurisdiction's proposed plan, just as judicial or administrative proceedings are stayed pending proceedings on particular issues in another tribunal with primary jurisdiction. See, *e.g.*, *California* v. *FPC*, 369 U.S. 482, 490 (1962) (administrative action should have been stayed pending judicial proceeding); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Carnation Co.* v. *Pacific Westbound Conference*,

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covered jurisdiction's proposal. Where because of exigent circumstances prior preclearance is impossible and the district court is required to devise its own interim plan, the covered jurisdiction would, of course, retain its rights as a litigant to comment on tentative plans formulated by the court and otherwise to provide technical information or expertise to the court. Preclearance of the resulting plan would be required only if the jurisdiction's input into the plan so dominates the formulation process that the resulting proposal, on balance, "reflect[s] the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 548 (concurring opinion of Justice Powell).

[16] See note 14, *supra*.

383 U.S. 213, 222-224 (1966) (judicial proceedings stayed pending administrative action). Indeed, this procedure was expressly authorized by this Court in *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 542, and *Connor* v. *Waller*, *supra*, and has been followed in cases alleging violations of both Section 5 and the Constitution. See, *e.g.*, *United States* v. *Clarke County Commission, Clarke County, Alabama*, Civ. No. 80-0547-P (S.D. Ala. Oct. 24, 1980) (three-judge court); see also *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977).

The Voting Rights Act itself, and particularly its extensions (see pages 14-15, *supra*), represent a balancing by Congress of the disadvantages of delay and other possible administrative difficulties against the need for adherence to the procedures of Section 5. The requirement that reapportionment courts not pass on proposals of covered jurisdictions until they obtain Section 5 clearance reflects the results of that balancing. Thus, the preclearance requirement does have a congressionally authorized potential for delaying final approval of the plan by the reapportionment court if the covered jurisdiction litigates the issue of whether its proposed plan meets Section 5 standards in the District Court for the District of Columbia. However, Congress also provided covered jurisdictions with the more expedient option of instead submitting their proposals for administrative review by the Attorney General who has 60 days within which to interpose an objection, 42 U.S.C. 1973c.[17] This alternative was designed "to provide a speedy alternative method of compliance to covered States." *Morris* v. *Gressette*, *supra*, 432 U.S. at 503; see also *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 549. If the Attorney General fails to interpose a timely objection based on a complete submission, this action is not reviewable and "[t]he extraordinary remedy of postponing the implementation of validly enacted state legislation * * * come[s] to an end * * *." *Morris* v. *Gressette*, *supra*, 432 U.S. at 504.

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[17] The jurisdiction may shorten the 60-day period by seeking expedited review from the Attorney General. 28 C.F.R. 51.22.

Congress has thus provided a means of minimizing the potential for delay inherent in Section 5 procedures.

This case itself suggests that petitioners' concern that preclearance will impose unacceptable delays is unfounded. One year elapsed between the time the commissioners submitted their proposed plan to the district court in November 1979, and the November 1980 elections for County Commissioner in Precincts 1 and 3 for which the plan was designed. Had the commissioners instead submitted the plan to the Attorney General in November of 1979, preclearance could have been obtained within ample time to implement the proposal for the 1980 elections if the plan met Section 5 standards. If the Attorney General had objected to the plan and the commissioners were then unable to obtain preclearance for any other proposal prior to the 1980 election, the district court could have devised and ordered into effect its own reapportionment plan pursuant to *Connor* v. *Johnson, supra.*

2. *Review by the District Court of a Covered Jurisdiction's Proposed Reapportionment Plan is not an Effective Substitute for Section 5 Preclearance*

There is no merit to petitioners' suggestion that Section 5 preclearance is unnecessary in this case or, indeed, in any voting rights litigation, because "[t]he function contemplated to be served by Section 5 has already been performed" by the district court (Pet. Br. 35). One of the reasons Congress enacted Section 5 was that case-by-case litigation had proven inadequate to enforce Fifteenth Amendment rights. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 314. Section 5, accordingly, is not simply a substitute for case-by-case litigation. As we have noted (*supra,* pages 11-12), the special protection of Section 5 is achieved by placing the burden of proof on the covered jurisdiction rather than the plaintiff, and by requiring the jurisdiction to demonstrate that its plan has neither the purpose nor the effect of denying or abridging the right to vote on the basis of race, color

or language. *City of Rome* v. *United States, supra*; cf. *United States* v. *Sheffield Board of Commissioners, supra*, 435 U.S. at 121. Section 5 includes the requirement that "no voting-procedure changes * * * be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). In contrast, proof of retrogression alone is not sufficient to establish a constitutional claim of voting discrimination based on race, color or language. *City of Mobile* v. *Bolden, supra.*[18]

Although Congress could have provided that the local district court was to apply Section 5 standards in evaluating the covered jurisdiction's proposed reapportionment plan,[19] the plain language of Section 5 as consistently interpreted by this Court vests primary jurisdiction to resolve the substantive questions of voting discrimination under Section 5 solely in the Attorney General and the District Court for the District of Columbia. See, *e.g.*, *United States* v. *Board of Supervisors of Warren County, Mississippi, supra*, 429 U.S. at 646; *Connor* v. *Waller, supra; Perkins* v. *Matthews, supra*, 400 U.S. at 383, 385; *Allen* v. *State Board of Elections, supra*, 393 U.S. at 557-560. This grant of exclusive primary jurisdiction was intended to ensure that the substantive standards imposed by Section 5 are uniformly applied throughout all covered states and political subdivisions. *Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., Pt. 1, 69-73 (1965). The desired uniformity would be lost if local reappor-

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[18] There is even less potential for duplication where, as here, the constitutional violation being remedied by the district court is based on one-person, one-vote principles rather than a claim that the existing apportionment scheme unconstitutionally dilutes the voting strength of a particular minority group.

[19] For example, district courts have similar authority under 42 U.S.C. 1973a(c), which applies to jurisdictions that are not covered under Section 4 of the Act and therefore are not subject to the preclearance requirements of Section 5. See H.R. Rep. No. 439, 89th Cong., 1st Sess. 13, 23 (1965).

tionment courts were to apply Section 5 standards independently.

In addition, the centralization of responsibility for the enforcement of the standards assures that they will be given the high priority Congress intended. The danger that Section 5 claims will not be adequately presented or reviewed in the local district court is particularly acute in one-person, one-vote cases, where the plaintiffs are frequently white; they may have no interest in and therefore never raise the question of the impact of the proposed plan on minority groups in the community. Even if the issue is raised, the district court may not be sensitive to the particular concerns that led to the enactment of Section 5. For example, in the instant case, although the respondents argued that the Commissioners' proposed plan had a discriminatory effect on Mexican-Americans because it reduced their voting strength in Precinct 1 from 40 to 24%, the district court in approving the plan did not address this claim. This case itself thus suggests that the statutory obligation imposed by Section 5 can most effectively be met if preclearance is required before the district court considers the proposed plan.

II.

WISE v. *LIPSCOMB* TEACHES THAT THE REAPPORTIONMENT PLAN FORMULATED BY THE COMMISSIONERS COURT IS A LEGISLATIVE PLAN AND IS THEREFORE SUBJECT TO PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

Wise v. *Lipscomb*, *supra*, makes clear that the determination of whether a reapportionment plan is to be treated as legislative or as judicial depends on whether it was devised by the legislature or the court; a plan that is prepared and becomes effective as a result of a court order can nevertheless qualify as a legislative plan, so long as it reflects the legislative judgment of the covered jurisdiction, rather than the remedial directive of the federal court. Accordingly, the Court's decision in *Wise* both supports the interpretation of Section 5 out-

lined above and provides an independent basis for affirming the court of appeals' decision. Although the issue in *Wise* was whether the plan there should be evaluated under the judicial review standards applicable to legislative plans or those applicable to judicial plans, the Court's analysis of the distinction between the two types of plans applies with equal force to the Section 5 question presented here.

A. Under the Criteria Set Forth in *Wise* v. *Lipscomb*, the Reapportionment Plan Formulated by the Commissioners Court in this Case Qualifies as a Legislative Plan

In *Wise* v. *Lipscomb*, *supra*, both Justice White, announcing the Court's judgment, and Justice Powell, concurring, focused on the legislative origin of the plan at issue in concluding that, although it was promulgated pursuant to court order, it should not have been evaluated under the more stringent standards applicable to judicially devised plans.[20] Justice White's opinion con-

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[20] As Justice Marshall recognized in his dissenting opinion in *Wise*, *supra*, 437 U.S. at 552, the majority's conclusion in *Wise* cannot be reconciled with the Court's footnote statement in *East Carroll Parish*, *supra*, 424 U.S. at 638 n.6, that "court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5." This was recognized in Justice Powell's opinion as well, which limits *East Carroll Parish* to "its peculiar facts," 437 U.S. at 549. It is not necessary, however, to overrule *East Carroll Parish* in order to find *Wise* applicable to the question presented here. In *East Carroll Parish*, the state enabling legislation had been disapproved by the Attorney General under Section 5. The significance of this fact, which is not present in either *Wise* or this case, was properly assessed in Justice Powell's concurring opinion in *Wise* (437 U.S. at 549):

> This determination meant that the specific plans proposed by the school board and police jury in that case would have had unlawful effects. Because their legislative judgment had been found tainted in that respect, it followed that the normal presumption of legitimacy afforded the balances reflected in legislative plans, see *Burns* [v. *Richardson*, 384 U.S. 73, 84-85 (1966)], could not be indulged.

cluded that "the body governing Dallas validly met its responsibility of replacing the apportionment provision invalidated by the District Court with one which could survive constitutional scrutiny" (437 U.S. at 546). In Justice Powell's view, the authority under state law of the legislative body to enact the plan was not significant (437 U.S. at 548):

> The essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court. As we held in *Burns* [v. *Richardson*, 384 U.S. 73 (1966)] at 85, "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." This rule of deference to local legislative judgments remains in force even if, as in *Burns*, our examination of state law suggests that the local body lacks authority to reapportion itself.

We agree with this analysis. In particular, the preclearance requirement of Section 5 should not depend on whether the jurisdiction had unrestricted authority under state law to enact the proposed plan. This follows from the plain language of Section 5, and is supported by sound policy considerations as well. States and political subdivisions should not be invited to avoid complying with the Act by proposing reapportionment plans that do not meet state law requirements. Moreover, for covered jurisdictions, Section 5 imposes a uniform standard, not one that varies from state to state depending on the peculiarities of local law. As this Court's opinions in *Wise* v. *Lipscomb*, *supra*, illustrate, the subtle questions of state law that arise in this context evade ready and consistent resolution and are not questions to which the federal courts bring any particular expertise.[21]

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[21] For similar reasons, whether the legislative body purported to reapportion itself should not be significant. Compare *Wise* v. *Lips-*

In any event, the facts in this case parallel those in *Wise* v. *Lipscomb*, *supra*; even under Justice White's approach the plan formulated and adopted by the Commissioners Court in this case qualifies as a legislative plan. Contrary to petitioners' suggestion (Pet. Br. 16), the Commissioners Court had full authority under state law to reapportion the commissioner precincts.

The Texas Constitution expressly authorizes the Commissioners Court to divide the county into four commissioner precincts "from time to time, for the convenience of the people * * *." Tex. Const. Ann. art. 5, § 18 (Vernon 1955). This power has been broadly interpreted by the state courts: "When the [commissioners] court was once established, no legislation was needed to enable it to exercise [this power] * * *. The direction is plain and simple, and without condition of restriction * * *." *State* v. *Rigsby*, 43 S.W. 271, 273 (Tex. Ct. Civ. App. 1897).

The plan proposed by the Commissioners Court did not violate any state statutory restriction on the commissioners' reapportionment power. Article 2.04(1) of the Texas Election Code, the only statutory provision cited by petitioners, applies to alterations in *election* precinct lines, not to alterations in *commissioner* precinct lines. Election precincts are the electoral sub-units of commissioner precincts and determine where individual voters are registered and where they vote. Article 2.04(1) restricts "changes in election precincts" to the July or August term (Tex. Elec. Code Ann. art. 2.04(1) (Vernon Supp. 1979)). The purpose of this statutory provision is to prevent the "confusion in election processes" that would result from altering election precinct boundaries, and therefore polling places and registration lists, immediately before an election. *Wilson* v. *Weller*, 214 S.W.2d 473, 474 (Tex. Ct. Civ. App. 1948). Although the plan proposed by the Commissioners in this case al-

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comb, supra, with *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636, 638 n.6 (1976). This factor can also be readily manipulated by the legislature by carefully limiting the wording of its endorsement of the proposed plan, as the Commissioners Court attempted to do in this case (see App. 1a-3a, *infra*).

ters the boundaries of the commissioner precincts, it does not renumber or alter the boundaries of the election precincts. Under the plan, election precincts are transferred from one commissioner precinct to another, but all voters continue to vote in the same election precinct.[22]

Even assuming, arguendo, that the commissioners' plan altered election precinct lines in violation of Article 2.04 (1), the Commissioners Court had at least as much authority to reapportion itself as the City Council did in *Wise*. Once the existing apportionment scheme was invalidated, the Commissioners Court, like the Dallas City Council, had inherent power to fill the void created by the court's declaration of unconstitutionality. See *Mauzy* v. *Legislative Redistricting Bd.*, 471 S.W.2d 570 (Tex. Sup. Ct. 1971). It merely accelerated the timing of its reapportionment proposal in response to the court's decision. Certainly this state statute presents no more serious impediment to legislative authority than the requirement in *Wise* that the City Charter be amended by popular vote. In contrast to *East Carroll Parish, supra*, in neither *Wise* nor this case had the Attorney General interposed an objection to state enabling legislation. Accordingly, the court of appeals correctly concluded that the reapportionment plan was legislative under this Court's decision in *Wise* v. *Lipscomb*.

B. The Principles Announced in *Wise* v. *Lipscomb* Apply With Equal Force to the Question of Section 5 Preclearance Presented Here

On September 18, 1975, while *Wise* was pending in the court of appeals, Texas and its political subdivisions

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[22] It is true that four election precincts are "split" between two commissioner precincts; certain residents of these election precincts vote for one commissioner position and the remaining residents vote for the other commissioner position. However, because the boundaries of the election precincts were not redrawn, the registration lists and polling places remain the same (J.A. 47-48). The plan has thereby avoided the "confusion in election processes" that Article 2.04 was designed to prevent. *Wilson* v. *Weller, supra.*

became subject to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (see page 11, *supra*). Although the United States argued in its amicus brief in this Court that the Dallas City Council's reapportionment plan was subject to preclearance under Section 5 (*Wise* v. *Lipscomb*, No. 77-529, Brief of the United States as Amicus Curiae 32-36), the Court declined to address the retroactive application of Section 5 because this issue had not been raised by the parties or considered by the court of appeals (*Wise* v. *Lipscomb*, *supra*, 437 U.S. at 547, 549, 550). The Court's discussion of the difference between legislative and judicial reapportionment plans, for purposes of determining the appropriate level of judicial scrutiny to be used in evaluating them, nevertheless applies with equal force to the Section 5 question presented in this case, which is unencumbered by issues of its retroactive application.

The Court's treatment of the distinction in *Wise* is fully consistent with and merely extends the reasoning of its prior Section 5 decisions in *Connor* v. *Johnson*, *supra*, and *Connor* v. *Waller*, *supra*. Moreover, the Court in these decisions and in others has afforded parallel treatment to the related determinations of whether preclearance is required under Section 5 and whether the plan should be evaluated under constitutional requirements or also under the more stringent federal court remedial standards. For instance, in *Connor* v. *Waller*, *supra*, 421 U.S. at 656-657, the Court authorized the district court, pending preclearance of the legislative plan under Section 5, "to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan* v. *Howell*, 410 U.S. 315 (1973); *Connor* v. *Williams*, 404 U.S. 549 (1972); and *Chapman* v. *Meier*, 420 U.S. 1 (1975)." The implication of this alternative is clear: Either a reapportionment plan is subject to preclearance under Section 5 as a legislative plan that the covered jurisdiction "enact[s] or seek[s] to administer," or the plan is subject to the more stringent

remedial standards applicable to judicially devised reapportionment plans.

Subsequently, in *East Carroll Parish, supra*, the Court determined that the reapportionment plan at issue there was judicial rather than legislative for both purposes; consequently, the remedial principle favoring single-member districts applied but the preclearance requirements of Section 5 did not. Its only discussion of the distinction between legislative and judicial reapportionment plans occurred in the footnote on Section 5 (424 U.S. at 638 n.6). And in *Wise* v. *Lipscomb* itself, the Court again recognized that the determination of whether a reapportionment plan is legislative or judicial is the same for purposes of both Section 5 and the remedial standards under which the plan should be evaluated. Each of the opinions attempts to reconcile the Court's conclusion in *Wise* with the footnote language in *East Carroll Parish, supra*, 424 U.S. at 638 n.6, categorizing the plan at issue there as a judicial plan not subject to Section 5 preclearance. *Wise* v. *Lipscomb, supra*, 437 U.S. at 545-546, 548-549, 551-552. Most recently, Justice Powell, in his opinion granting a stay in this case, treats *Wise* as directly on point. *McDaniel* v. *Sanchez*, No. 80-180 (Aug. 14, 1980), slip op. 3-4. (Powell, Circuit Justice). See also *Marshall* v. *Edwards*, 582 F.2d 927, 931-934 (5th Cir. 1978); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1301-1302 (5th Cir. 1973).

Even if the question were an open one, the policies underlying Section 5 of the Voting Rights Act of 1965 suggest that preclearance should be required of all reapportionment plans that qualify as "legislative" under *Wise* and therefore are not subject to the stricter standards applicable to judicially-devised plans. As we have noted (pages 9-12, *supra*), Congress concluded, based on the past history of voting discrimination by covered jurisdictions, that the legislative judgment of these jurisdictions is not entitled to the deference normally afforded to state and local legislatures. See *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Under Section

5, the legislative judgment of these jurisdictions is subject to special scrutiny to ensure that proposed new election procedures have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color or language. *City of Rome* v. *United States*, *supra*. Where a covered jurisdiction in the course of litigation formulates and proposes a new reapportionment plan to replace an unconstitutional scheme, the exercise of this legislative judgment is not subject to the stricter standards governing judicially-devised reapportionment plans. *Wise* v. *Lipscomb*, *supra*. Because a legislative judgment is exercised, however, the covered jurisdiction's plan remains subject to the independent requirements of Section 5. S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975). Any other result would permit a substantial group of reapportionment plans—proposed by jurisdictions with a long history of voting discrimination—to go into effect with neither heightened judicial scrutiny nor the special scrutiny prescribed by Section 5.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1980

APPENDIX

SPECIAL SESSION—NOVEMBER 1, 1979

BE IT REMEMBERED, that on this 1st day of November, A.D. 1979, the Commissioners Court of Kleberg County, Texas, met in Special Session, to consider the following business, to-wit:

PRESENT: Hon. W. C. McDaniel, County Judge, Presiding
Doyle Dreyer, Commissioner, Precinct #1
V.T. Collins, Commissioner, Precinct #2
Earl Hubert, Commissioner, Precinct #3
Romeo Lomas, Commissioner, Precinct #4
Ura Dean Ware, County Clerk

IN THE MATTER OF
CONTINUING CETA PROGRAM
IN KLEBERG COUNTY AS CETA

It appearing to the Court that it would be advantageous to continue the CETA program under Title 2D and Title VI of said program which has formerly been administered by the City of Kingsville. Motion was made by Commissioner Dreyer, and seconded by Commissioner Lomas that Kleberg County continue such program. Upon vote, motion carried with Commissioners Collins and Hubert voting NO.

IN THE MATTER OF
ADMINISTRATION OF CETA PROGRAM

Motion was made by Commissioner Lomas and seconded by Commissioner Dreyer, that the CETA Program be administered under the general supervision of the County Auditor's Department and the hiring of any personnel thereunder must first have the approval of this Commissioners' Court. Upon vote, motion carried unanimously.

IN THE MATTER OF RE-DISTRICTING
COMMISSIONERS' PRECINCTS

It appearing to the Court that sufficient information has been furnished to this body to redistrict the Commissioners' precincts according to one man, one vote, as evidenced by the 1970 census, and as ordered by Federal District Judge Owen D. Cox. Motion was made by Commissioner Hubert and seconded by Commissioner Collins that the map be approved and that such precincts be numerically as follows:

Precinct 1	8,242
Precinct 2	8,324
Precinct 3	8,385
Precinct 4	8,307

and that such plans be submitted to the Federal District Judge in Corpus Christi for approval. Upon vote, motion carried unanimously.

With no further business at hand to be considered by the Court at this time, adjournment was had.

/s/ W.C. McDaniel

W.C. MCDANIEL, County Judge

ATTEST: Ura Dean Ware

URA DEAN WARE, County Clerk

THE STATE OF TEXAS)
)
COUNTY OF KLEBERG)

I, Ura Dean Ware, Clerk of the County Court of Kleberg County, Texas, do hereby certify that the above and foregoing is a true and correct Copy of Commissioners Court Special Session of November 1, 1979, as the same now appears of record in my office in Volume 6, page 62 of the Minutes of Commissioners Court, Records of Kleberg County, Texas.

Given under my hand and seal of office, at office in Kingsville, Texas, this 21st day of January, A.D. 1980.

Ura Dean Ware
Clerk, County Court, Kleberg County, Texas

/s/ Fina Scramuzza, Deputy

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